

CCASE:
SOL (MSHA) V. BROWN BROTHERS SAND
DDATE:
19940225
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 93-370-M
Petitioner : A. C. No. 09-00265-05516
v. :
 : Junction City Mine
BROWN BROTHERS SAND COMPANY, :
Respondent :

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia, for
Petitioner;
Carl Brown, Steve Brown and Greg Brown, Brown
Brothers Sand Company, Howard, Georgia, pro se,
for Respondent.

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil
penalty filed by the Secretary of Labor against Brown Brothers
Sand Company pursuant to Sections 105 and 110 of the Federal Mine
Safety and Health Act of 1977, 30 U.S.C. 815 and 820. The
petition alleges a violation of the Secretary's mandatory safety
standards. For the reasons set forth below, I find that Brown
Brothers committed the violation as alleged.

The case was heard on February 1, 1994, in Butler, Georgia.
Inspector Steve Manis testified on behalf of the Petitioner.
Mr. Jessie J. Lucas testified for the Respondent.

FINDINGS OF FACT

Inspector Manis inspected Brown Brothers Sand Company on
March 25, 1993. During his inspection, he observed that the
guard on the tail pulley for the railroad car conveyor belt was
not in place, but was lying on the ground. As a result, he
issued Citation No. 3603315 which stated that: "The guard for
the R R car belt conveyor tail pulley was left off. R R car
loading area of the tunnel" (P.Ex. 2). Inspector Manis issued
the citation as a violation of Section 56.14112(b) of the
Secretary's Regulations, 30 C.F.R. 56.14112(b).

Inspector Manis returned to Brown Brothers on April 15, 1993. At that time, he saw that the tail pulley guard had been replaced and terminated the citation.

FURTHER FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Section 56.14112(b) provides that: "Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." In this case, there is no doubt that the tail pulley guard was not securely in place (Tr. 14, 50) and that testing or making adjustments were not being performed (Tr. 17, 37, 50). However, there was a question raised at the hearing as to whether the belt was in operation.

Inspector Manis testified that the belt was in operation and loading sand into a railroad car when he observed the violation (Tr. 21-22, 31). Mr. Lucas testified that the belt was not running while Inspector Manis was in the area of the conveyor (Tr. 34-36). On the other hand, Mr. Lucas also testified that he did not see Mr. Manis inspect the conveyor belt because he (Lucas) was not in the area of the belt while Mr. Manis was inspecting and that sand may have been loaded on that day (Tr. 34-37).

Fact of Violation

I conclude that the conveyor belt was in operation when Inspector Manis observed the missing guard. The inspector's testimony is unequivocal on this point and was not tested or challenged at the hearing. Conversely, Mr. Lucas' assertion that the belt was not running is diminished by the fact that he did not see the inspector examine the belt and by the fact that sand had probably been loaded that day. Consequently, he does not know exactly when the citation was issued and he does not directly contradict Manis' testimony or make what the inspector said that he saw impossible to have occurred.

I find that on March 25, 1993, the tail pulley on the railroad car conveyor belt was not securely in place; that the belt was in operation; and that no testing or adjusting of the belt or tail pulley, requiring removal of the guard, was being performed. Accordingly, I conclude that Brown Brothers violated Section 56.14112(b) of the Regulations as alleged.

Negligence

The inspector found that this violation resulted from Brown Brothers' moderate negligence. In view of the fact that Brown Brothers had previously been cited and penalized for this exact same violation [Secretary v. Brown Brothers Sand Company, 9 FMSHRC 636 (March 1987, Judge Koutras)] and the fact that the guard could have been off for as long as two days (Tr. 50), this would seem to be a generous assessment of the degree of Brown Brothers' negligence. However, it does not appear that anything would be gained by changing the degree of negligence at this stage, so I conclude that the violation in this case resulted from Brown Brothers' moderate negligence.

CIVIL PENALTY ASSESSMENT

With regard to the criteria to be considered when assessing a civil penalty, which are set out in Section 110(i) of the Act, 30 U.S.C. 820(i), the parties have stipulated that: (1) Brown Brothers is a small operator employing nine to ten people; (2) the payment of the proposed civil penalty will not adversely affect Brown Brothers' ability to continue in business; (3) Brown Brothers has a history of nine prior citations during the period between September 25, 1990, and September 24, 1992; and (4) the citation in this proceeding was time abated in good faith by Brown Brothers (Tr. 4).

The Secretary has proposed a penalty of \$50.00 for the violation in this case. In view of the information above, as well as the fact that the inspector found that an injury was unlikely to result from this violation and that Respondent's negligence was moderate, I conclude that the proposed penalty of \$50.00 is appropriate.

ORDER

Citation No. 3603315 is AFFIRMED as written. Brown Brothers Sand Company is ORDERED to pay a civil penalty of \$50.00 for this violation within 30 days of the date of this decision. On receipt of payment, this case is DISMISSED.

T. Todd Hodgdon
Administrative Law Judge

~455

Distribution:

Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department
of Labor, 1371 Peachtree St., N.E., Room 339, Atlanta, GA 30367
(Certified Mail)

Carl Brown, Brown Brothers Sand Company, Highway 90, Box 82,
Howard, GA 31039 (Certified Mail)

/lbk